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Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

THE CORPORATION COMMISSION
OF THE STATE OF OKLAHOMA, *Petitioner*

V.

ANR PIPELINE COMPANY, ET AL., *Respondents*

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

BRIEF FOR THE RAILROAD COMMISSION OF TEXAS, THE NEW MEXICO OIL CONSERVATION COMMISSION, THE LOUISIANA OFFICE OF CONSERVATION OF THE DEPARTMENT OF NATURAL RESOURCES, THE CORPORATION COMMISSION OF KANSAS AND THE NORTH DAKOTA INDUSTRIAL COMMISSION AS AMICI CURIAE IN SUPPORT OF PETITIONER THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA

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QUESTIONS PRESENTED

1. In light of this Court's recent holding in *Northwest Central Pipeline Corp. v. State Corporation Commission of Kansas*, 57 U.S.L.W. 4302 (U.S. Mar. 6, 1989), is the State of Oklahoma preempted under the Natural Gas Act and the Natural Gas Policy Act of 1978 from exercising regulatory authority pursuant to Oklahoma Statute title 52, section 240 when such regulation necessarily envisions some incidental impact on the purchasing patterns and practices of interstate natural gas pipelines?

2. Similarily, is the State of Oklahoma preempted under the Natural Gas Act and the Natural Gas Policy Act of 1978 from establishing a priority of production schedule pursuant to the State's strong interest to prevent waste and protect correlative rights?

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I. Interest of Amici Curiae

The Railroad Commission of Texas, the New Mexico Oil Conservation Commission, the Louisiana Office of Conservation of the Department of Natural Resources, the Corporation Commission of Kansas and the North Dakota Industrial Commission are the oil and gas regulatory agencies for their respective states.[1] These states and their agencies have enacted individualized regulatory programs to establish a property rights system in common gas reservoirs to ensure the orderly, nonwasteful and equitable development of natural resources located within their boundaries.[2] The amici state agencies have a vital interest in the outcome of this case, and together urge the Court to issue a writ of certiorari to review the final judgment and opinion of the United States Court of Appeals for the Tenth Circuit. In the alternative, the Court is urged to vacate the judgment of the lower court and remand the case for further consideration in light of the Court's recent decision in *Northwest Central Pipeline Corp. v. State Corporation Commission of Kansas*, 57 U.S.L.W. 4302 (U.S. Mar. 6, 1989) (*"Northwest Central Pipeline"*).

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[1]Together, Oklahoma, Texas, Louisiana, North Dakota, Kansas and New Mexico produce approximately 84 percent of the nation's onshore natural gas supplies annually. U.S. Department of Energy, 1 *Natural Gas Annual 1987* at 9.

[2]Tex. Nat. Res. Code Ann. §§85.055; 86.081 *et seq.* 111.081 *et seq.* (Vernon 1978 and Supp. 1989); N.M.S.A. §70-2-16 (1986 Supp.); La. Rev. Stat. Ann. §30.1 (West 1975); N.D. Cent. Code §38-08-06 (1987); Kan. Stat. Ann. §§55-701 *et seq.* (1983 and Supp. 1988).

II. Summary of Argument

In *ANR Pipeline Co. v. Corporation Commission of Oklahoma*, 860 F.2d 1571 (lOth Cir. 1988) ("*ANR*"), the decision from which Oklahoma petitions for a writ of certiorari, the Tenth Circuit held Oklahoma's "ratable-take" statute (Okla. Stat. Ann. tit. 52, §240 (1981)), and Oklahoma Corporation Commission Rule 1-305 (1983) unconstitutional, stating that they are preempted by the Natural Gas Act, 15 U.S.C. §§717 *et seq.* ("NGA"), and Natural Gas Policy Act of 1978, 15 U.S.C. §§3301 *et seq.* ("NGPA"), and, therefore, violative of the Supremacy Clause.

This Court's recent holding in *Northwest Central Pipeline* acknowledges a more pragmatic jurisdictional interplay between state and federal regulation of the natural gas industry. The *ANR* holding, when construed in the context of *Northwest Central Pipeline*, is too broad and unduly intrusive into an area recognized to be within the authority and jurisdictional ambit of the states: the regulation of production and gathering, prevention of waste of limited natural resources and protection of correlative rights. For these reasons, Oklahoma's ratable-take regulations do not stand as an obstacle to the accomplishment of the purposes and objectives of Congress and are not in conflict with *Northern Natural Gas Co. v. Corporation Commission of Kansas*, 372 U.S. 84 (1963) (*"Northern Natural"*) or *Transcontinental Gas Pipeline Corp. v. State Oil and Gas Board*, 474 U.S. 409 (1986) (*"Transco"*). At the very least, Oklahoma's regulatory scheme of maintaining a priority system requiring production from various categories of producing wells in priority order when supply exceeds demand is the type of regulation protected by the states' authority to prevent waste and protect correlative rights.

Champlin Ref. Co. v. Corporation Comm'n of Oklahoma, 286 U.S. 210, 233-34 (1932) ("*Champlin*").

In this term, the Court has unanimously recognized that state regulation of production practices may necessarily impact purchasing decisions and thence costs of interstate pipelines without resulting in conflict-preemption. Thus, this Court's review of the *ANR* decision demands a sensitive application of preemption analysis. *Northwest Central Pipeline*, 57 U.S.L.W. at 4308. The Tenth Circuit threatens to disrupt the highly sensitive state-federal system of natural gas regulation by restraining Oklahoma from enforcing its regulatory powers justly reserved to it by the NGA and NGPA. The requested writ of certiorari should be granted in order for this Court to address these important questions of state and federal law.

III. Argument

A. Traditionally, Courts Have Recognized States' Power to Regulate in Order to Prevent Waste of Limited Natural Resources and Protect Correlative Rights.

It has long been recognized that there exists a legitimate exercise of state power to conserve limited natural resources and to protect the correlative rights of mineral owners. *Patterson v. Stanolind Oil & Gas Co.*, 305 U.S. 376, 379 (1939) (upholding the validity of well-spacing regulations); *Champlin*, 286 U.S. at 233-34 (upholding the common state practice of placing "allowable" ceilings on the amount of gas that a particular well or pool may produce during a given period of time); *Bandini Petroleum Co. v. Superior Ct. of California*, 284 U.S. 8, 18-20 (1931) (upholding regulations preventing the wasteful practice of blowing, release or escape of gas); *Ohio Oil Co. v. Indiana*, 177

U.S. 190, 211-12 (1900) (upholding statute prohibiting the wasteful practice of venting gas into the open air under the state's authority to prevent waste and protect correlative property rights). Indeed, in the words of this Court, "[i]t is now undeniable that a state may adopt reasonable regulations to prevent economic and physical waste of natural gas." *Cities Service Gas Co. v. Peerless Oil & Gas Co.*, 340 U.S. 179, 185 (1950). Regulation aimed at the prohibition of waste, "whether primarily on behalf of other owners of gas in the common reservoir, or because of the public interests involved," passes constitutional muster. *Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55, 76 (1937).

B. State Conservation Rules, Including Rules Establishing a Priority Schedule, Are an Integral Part of State-Administered Systems for Defining and Enforcing Property Rights.

In Oklahoma, as well as the amici states, property rights in oil and gas resources are defined and enforced so as to create a reconciliation between two different property systems: (1) a pure common property system, epitomized by the rule of capture, whereby an individual's property interest consists of a right not to be excluded from the oil or gas in a common reservoir, and (2) a pure private property system, where the property interest consists of a right to exclude others from a defined portion of the oil and gas in a common reservoir. The producing states have historically steered a middle course because experience has shown that neither extreme is satisfactory. State regulation of production rates and priority schedules, as well as spacing regulations, allocation of demand and other such matters, constitutes an administrative system that implements a property rights regime falling

between the common property and private property paradigms.

The Supreme Court has long recognized that state production regulations are integral to the existence and enforcement of property rights:

> [r]egulations of natural deposits of oil and gas and the right of the owner to take them as an incident of title in fee to the surface of the earth . . . is ultimately but a regulation of real property, and they must hence be treated as relating to the preservation and protection of rights of an essentially local character.

Ohio Oil Co. v. Indiana, 177 U.S. 190, 212 (1900). The Court also has recognized that the property regimes administered by states with respect to petroleum resources are a middle-ground between common property and private property concepts. *Railroad Comm'n of Texas v. Rowan & Nichols Oil Co.*, 310 U.S. 573, 579 (1940).

C. The Congressional Intent Behind the NGA and NGPA Recognizes the Strong State Interests to Prevent Waste and to Define and Protect Correlative Property Rights.

The legislative history of the NGA clearly establishes that Congress did not intend to preempt or interfere with the states' role in waste prevention and the protection of correlative rights:

> [t]here is no intention in enacting the present legislation to disturb the states in their exercise of such jurisdiction. However, in the case of sales for resale, or so-

> called wholesale sales, in interstate commerce. . . the legal situation is different. Such transactions have been considered not to be local in character and, even in the absence of congressional action, not subject to state regulation . . . . The basic purpose of the present legislation is to occupy this field in which the Supreme Court has held that the states may not act . . . . The bill takes no authority from state commissions, and is so drawn as to complement and in no manner usurp state provisions for cooperative action with state regulatory bodies.

H.R. Rep. No. 709, 75th Cong., lst Sess. 1-2 (1937) (Report of the House Committee on Interstate and Foreign Commerce on H.R. 6586). The historical record is replete with affirmations that the NGA was necessary solely to fill a discrete regulatory gap, (protection of gas consumers from overcharges for interstate gas transportation and certain interstate sales of natural gas), and was not intended either to be a conservation measure or to disturb state power over conservation.

Nor was the NGPA intended to lessen such state power:

> [t]he legislation [NGPA] does not contemplate that FERC will intrude into the traditional conservation functions performed by the states. This is a matter reserved to the state agencies who, in the exercise of their historical powers, will continue to regulate such matters as drillings, locations, completion techniques, production rates, etc. Of course, the Secretary of Energy is authorized under

> Section 505 to intervene as a matter of right in state proration proceedings. This intervention authority, however, does not grant the Secretary any substantive powers or displace any state authority.

124 Cong. Rec. 38,366 (1978)(Comments of House Energy Committee Chairman John Dingell).[3] The legislative history of the NGPA fully supports the view that Congress did not intend to abolish rules of property regarding natural gas or to create a federal law of property and contract to govern in this area.

Although the Court has properly characterized the *Transco* decision as a case which simply "declared the post-NGPA validity of *Northern Natural's* holding," (*Northwest Central Pipeline*, 57 U.S.L.W. at 4306), the *Transco* opinion is relevant to the present case for its description of Congressional purposes and objectives regarding federal and state natural gas regulation in two respects: (1) both the majority and the dissent were in essential agreement that the Congressional objective in enacting the NGPA was to provide a "more significant role" for undistorted[4] market forces in the determination of wellhead prices; and (2) the majority opinion is not inconsistent with the dissent's view that an efficiently functioning market depends on the

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[3]Indeed, the FERC acknowledges the importance of this point and assured the court that the federal regulatory program can and will take into account interstate pipeline purchasing practices, as impacted by state regulation, as part of the overall environment in which interstate pipelines conduct their business. *Northwest Central Pipeline*, 57 U.S.L.W. at 4308.

[4]The Court in *Transco* seems to be divided as to whether, as a factual matter, the Mississippi order "distort[ed] the market" or "promote[d] the efficient operation of the market." *Compare Transco*, 106 S.Ct. at 718 *with id.*, 106 S.Ct. at 723 (Rehnquist, J., dissenting).

existence of property rights and rules of contract and that such rights and rules have not been promulgated under federal law. The Court recognized that Congress, through the NGA and NGPA, has not preempted state regulation of conservation or the prevention of waste of natural gas, because the applicable federal statutes are silent as to the grant of any such jurisdiction in FERC. Indeed, Mr. Patrick Martin, Professor of Mineral Law at Louisiana State University and former Commissioner of Conservation of the State of Louisiana, has clearly pointed out the consistency in this type of analysis:

> there is not the slightest indication anywhere that Congress had any intention whatsoever of preempting the states from protecting the correlative rights of owners in a common source of supply or from preventing waste . . . . But where is the preemption? Congress has undertaken no program that regulates the property rights within a common source of supply. The FERC has no such program. Congress cannot really be said to have occupied the field.

Martin, *State Regulation of Natural Gas Production: Is There Life After Transco?*, 38th Southwestern Legal Foundation Institute on Oil and Gas Law and Taxation, at 10-30 (1987).

With regard to Congressional purposes and objectives, the *Transco* majority and dissent express very similar views.[5] The majority perceives a "new

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[5]While the Court in *Transco* seems to be divided on only two particulars regarding Congressional purposes and objectives, these apparent divisions are not significant. First, the dissent

(Footnote continued on next page)

federal role" of overseeing "a national market price regulatory scheme" and characterizes this as a Congressional intention "to give market forces a more significant role in determining the supply, the demand, and the price of natural gas" and "to move toward a less regulated national natural gas market." *Transco*, 106 S.Ct. at 716-17. Similarly, the dissent states the NGPA was intended "to decontrol the wellhead price of natural gas sold to interstate pipelines, allowing prices to rise according to market conditions and causing shortages to vanish." *Id.* at 722 (Rehnquist, J., dissenting).

(Footnote continued from previous page)
takes issue with the majority opinion for mentioning "supply" and "demand" (as opposed to "price") as economic variables that Congress intended to decontrol. *Transco*, 106 S.Ct. at 722 n.5 (Rehnquist, J., dissenting). But, the majority clarifies in a footnote that its point is simply that "Congress clearly intended to eliminate the distortive effects that NGA price control had had on supply and demand." *Id.* at 718 n.6. This clarification is perfectly consistent with the dissent's view that the Congressional purpose and objective was to bring about a more efficiently operating commodity market by decontrolling wellhead prices. *Id.* at 722 (Rehnquist, J., dissenting). The NGPA was concerned with supply only to the extent that price ceilings create shortages.

The other area where the *Transco* Court seems to be divided concerns the "alleged" (in the dissent's view) Congressional purposes of national uniformity and protection of consumers. Although the dissent does not categorically deny the existence of these "alleged" objectives, the dissent does place these matters in a perspective that is consistent with the theory of Congressional purpose shared by both the majority and the dissent. The dissent in *Transco* recognized that "[w]hile the congressional desire to decontrol prices uniformly throughout the nation includes an intent to prevent States from enacting regulation to recontrol them, it does not imply an intent either to create an anarchistic regulatory gap free from property rights and contract rules, or to create a national law of contracts to govern natural gas relationships." *Id.* at 723 n.6 (emphasis in original) (Rehnquist, J., dissenting).

It is axiomatic that "a precondition for the establishment of a market is the existence and enforcement of property rights." P.S. Dasgupta & G.M. Heal, *Economic Theory and Exhaustible Resources* 48 (1979). The dissent in *Transco* recognized that "markets depend upon such rules [of property rights] to function efficiently." *Transco*, 106 S.Ct. at 772 (Rehnquist, J., dissenting). Therefore, for the natural gas market to operate without "distortion," the states must be responsible for creating and administering property rights regarding the commodity for which that market operates.

The Court has always acknowledged that conservation of the supply of natural gas is traditionally a function of state power. *Northern Natural*, 372 U.S. at 93. In this regard, it has upheld the common state practice of placing ceilings, called "allowables," on the amount of gas that a particular well or pool may produce during a given period. *Champlin*, 286 U.S. at 233-34. While such absolute restrictions on output have the potential of raising wellhead prices above competitive equilibrium, ratable-take rules by themselves, do not. *Transco*, 106 S.Ct. at 722 n.5. (Rehnquist J., dissenting).

D. The Oklahoma Regulatory Scheme Neither Intrudes in an Occupied Field of Congressional Governance Nor Obstructs the Accomplishment of Congressional Purposes and Objectives.

When Congress evidences a clear intent to occupy a given field, any state law falling within that field is preempted. *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 203-04 (1983). Preemption can also occur if the state law conflicts with the federal law to such an

extent that it is impossible to comply with both regulatory schemes, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963), or if the state law is a complete obstacle to the Congressional objectives, *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). This Court invalidated orders directed at interstate gas purchasers in *Northern Natural* because it was believed that the burden those orders placed on purchasers impermissibly encroached into an area chosen by Congress to be occupied by exclusive federal regulatory control; in *Transco*, the Court declared post-NGPA vitality of *Northern Natural* while holding that the challenged Mississippi order stood as an obstacle to the full accomplishment of the federal purpose. *Transco*, 474 U.S. at 422-23. This Court, however, has recognized that a very sensitive analysis must be employed when determining whether a state regulatory scheme is preempted under the supremacy clause, in an area where dual regulation is obviously intended. *Northwest Central Pipeline*, 57 U.S.L.W. at 4308.

The Oklahoma statute and rule at issue herein neither intrude in an occupied field of federal governance nor do they constitute a complete obstacle to Congressional objectives.[6] Congressional intent to

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[6]Indeed, the express legislative intent of the NGA, NGPA and this Court's prior holdings in *Champlin*, 286 U.S. at 233-37 and *Cities Service Gas Co. v. Peerless*, 340 U.S. 179, 184-85 (1980), and more recently in *Northwest Central Pipeline*, indicate that Congress has left to the states the continued authority to promote conservation and protect correlative property rights. This Court has stated:

> [c]learly, among the powers thus reserved to the states is the power to regulate the physical production and gathering of natural gas in the interests of conservation or of any other consideration of legitimate local concern. It was the intention of Congress to give the states full freedom in these matters.

Interstate Natural Gas Co. v. FPC, 331 U.S. 682, 690 (1947).

preempt state regulation should be inferred only where the comprehensiveness and pervasiveness of the federal regulation preclude supplementary state regulation, where the federal interest is sufficiently dominant, or where the goal of the federal law and the character of the obligations imposed by it reveal the same purpose.[7] *Schneidewind v. ANR Pipeline*, 108 S.Ct. 1145, 1150 (1988).

The Congressional objective in passing the NGA and NGPA was not to deny states the right to regulate the production of natural gas or to prohibit state regulation in the interests of conservation and protection of correlative rights. Furthermore, Congress did not intend to prohibit all actions that might affect the price of gas but rather to assure that market forces, operating without regulatory distortion, play a more significant role in determining wellhead prices. Free, "undistorted" markets depend on rules of property and contract to function efficiently. *Transco*, 106 S.Ct. at 722 (Rehnquist, J., dissenting). Congress has neither created such rules on its own motion nor abolished state-administered systems that define and enforce

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[7]In a borderline case where Congressional authority is not explicit the Court must determine whether state authority can practicably regulate a given area and, if the Court cannot so find, then and only then, is the Court compelled to decide whether federal authority governs. *FPC v. Transcontinental Gas Pipeline Corp.*, 365 U.S. 1, 19-20 (1961). Complexity and comprehensiveness of federal regulations alone is an insufficient basis for inferring preemptive intent. *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 107 S.Ct. 1419, 1426 (1987); *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 717 (1985) (comprehensiveness of federal regulations alone, does not necessarily determine federal preemption). Rather, this Court requires a "clear and manifest purpose" of Congressional intent to preempt before invalidating state action. *Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 108 S.Ct. 1350, 1355 (1988).

such rules. Since the Oklahoma regulatory scheme, including its priority of production schedule, is an integral part of such a legitimate state-administered system, the Oklahoma statute and rule do not stand as obstacles to the accomplishment of the full purposes and objectives of Congress.[8]

E. The Oklahoma Regulatory Scheme, Establishing a Priority of Production Schedule, is Consistent with Prior Opinions and Congressional Intent.

1. Oklahoma's priority of production schedule is a necessary and legitimate exercise of its police power to prevent waste.

Oklahoma maintains a priority of production schedule for the primary purpose of preventing waste of natural resources. The priority system generally guarantees continued production from the most fragile wells and does as much as possible to ensure maximum recovery of existing reserves. A state's priority production scheme generally determines the sequential order of production by the category of gas, with gas to be taken ratably in each category, without discrimination. Loss of otherwise recoverable reserves

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[8]Indeed, the Court in *Northern Natural* indicates that, while the troublesome category of state regulation is orders "directed" at interstate purchasers and wholesalers for resale, not all such orders would be preempted. "The former [conservation measures directed at interstate purchasers and wholesalers for resale] cannot be sustained when they threaten, as here, the achievements of the comprehensive scheme of federal regulation." *Northern Natural*, 372 U.S. at 94 (emphasis added). Presumably, such conservation measures would be acceptable as long as they did not threaten the federal scheme.

will occur if production is non-uniformly curtailed in the wells in the higher priority categories. Martin, *State Regulation of Natural Gas Production: Is There Life After Transco?*, 38th Southwestern Legal Foundation Institute on Oil and Gas Law and Taxation, at 10-7 (1987) (priority schedule utilized by states as "a further measure for the prevention of physical waste").

Oklahoma's Rule 1-305 is a regulatory program providing for priority production of hardship and distressed wells, enhanced recovery wells, and wells producing casinghead gas and associated gas with all remaining gas wells being assigned the lowest priority.[9] The Oklahoma rule reflects the state's concern for the potential impact special priority wells might have on the ultimate recovery of the state's natural resources. With regard to priority wells, waste of recoverable natural resources will generally occur unless continuous, steady production is maintained from distressed wells and secondary or tertiary recovery project wells. It is conceded to be an "established scientific fact that to secure the greatest ultimate recovery of oil and gas . . . , the maintenance of consistent reservoir pressure is essential." Summers, *Oil and Gas* §76 at 233 (Perm. ed. 1954).

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[9]The Oklahoma priority of production schedule differs from the amici states' priority schemes. Texas, for example, gives first priority to casinghead gas from secondary and tertiary oil recovery projects, which accounted for 10.8 percent of all Texas gas produced in 1988. These injection projects are engineered to maximize recovery at steady state flow rates, and their oil recovery percentages decline if they are operated intermittently or must be shut-in for lack of a market. Fifty-two percent of Texas' 1988 oil production came from secondary and tertiary recovery projects. The fundamental basis of all the states' priority of production schemes is prevention of waste of natural resources.

This Court has recognized this principle and the inevitably unfortunate physical waste of otherwise recoverable natural resources where, absent effective regulation, improvident dissipation of underground pressure is permitted to occur through the competitive incentives of common ownership of a common source of supply. Effective state conservation regulations employing an even-handed ratable-take rule would eliminate this danger. *Champlin*, 286 U.S. at 233. A state ratable-take rule is a necessary complement to a ratable-production rule and is essential to protect correlative rights and ensure maximum recovery of hydrocarbon reserves. *Northern Natural*, 372 U.S. at 655 (White, J., dissenting). Without the corresponding ratable-take rule, a ratable-production rule forces a producer to act in concert with other producers, over whose production activities he has no control or familiarity. In other words, ratable production regulations standing alone are difficult to enforce in practice because a well cannot produce without the gas production being purchased or taken; the two rules establish the necessary check and balance system crucial to effective state conservation regulations.

A state's priority of production schedule is the very type of valid constitutional state regulation which, when enacted under the traditionally recognized police power of a state to prevent waste, may have some effect on the *practices or costs* of interstate pipelines' purchases, though such effect will be purely incidental to the states' overriding objective of promoting conservation through maximization of the extraction of recoverable reserves from its marginally-producing wells.

In *Northwest Central Pipeline*, the Court found that a Kansas statute limiting the carry-forward of underage in order to encourage increased production from the Kansas-Hugoton Field was a valid exercise of

the state's police power, even though the state action would necessarily have an incidental effect on interstate pipeline purchasers' costs and ultimately, the interstates' consumers. In reconciling this seeming conflict, the Court specifically recognized that:

> [i]n the integrated gas supply system, these jurisdictional tensions will frequently appear in the form of state regulation of producers and their production rates that has some effect on the *practices or costs* of interstate pipelines subject to federal regulation. Were each such effect treated as triggering conflict pre-emption, this would thoroughly undermine precisely the division of the regulatory field that Congress went to so much trouble to establish in section l(b), and would render Congress' specific grant of power to the States to regulate production virtually meaningless.

Northwest Central Pipeline, 57 U.S.L.W. at 4308 (emphasis added).

2. Oklahoma's priority of production schedule furthers the Congressional intent to ensure optimum supplies of natural gas.

A priority of production schedule working in concert with state ratable-take provisions is the least intrusive and one of the most effective methods of preventing waste and ensuring the equitable protection of property interests. In the fragile wells addressed by a state's priority schedule, reserves not produced are likely lost forever. Clearly, Congressional intent in passage of the NGA and NGPA was to ensure long-

term supplies of natural gas. *Northwest Central Pipeline*, 57 U.S.L.W. at 4307.

The aim of federal regulation remains to assure adequate, long-term supplies of natural gas at fair and stable market prices. This country's energy independence demands such assurance. Any incidental impact which state regulation designed to prevent waste or protect correlative rights might have on the purchasing practices of interstate pipelines or upon their ultimate consumers would clearly pass the balancing test of *Pike v. Bruce Church,*[10] and constitute permissible state regulation. Where production of a priority status well's gas is dedicated to interstate commerce, the resultant and intended effect of state regulation would be the achievement of maximum recovery and availability of natural gas reserves to the interstate market.

The state's power to prevent waste necessarily includes the power to prevent the wasteful depletion of a common source of supply. *Champlin*, 286 U.S. at 234. Priority schedules ensure on-line maintenance of production from even the most difficult to produce reserves and thereby guarantee the continuation of the maximum supply of natural gas reserves to serve the nation's needs. The preservation of gas reserves is a complex regulatory task, best accomplished by state governments through the expertise of their respective state agencies.

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[10]397 U.S. 137, 142-43 (1970). Under the Court's balancing test as set forth in *Pike*, a state statute which has incidental effects on interstate commerce is constitutional as long as the statute "regulates even-handedly to effectuate a legitimate local public interest." The Oklahoma regulatory scheme at issue herein meets this test: it regulates both purchasers and producers to the same extent and effects the state's strong interest to prevent waste.

F. Oklahoma's Ratable-Take Regulations, Including Priority Schedules, Fall Within the NGA's "Production and Gathering" Exemption.

"Production" and "gathering" are terms referring to the physical acts of drawing the gas from the earth and preparing it for the first stages of distribution. *Colorado Interstate Gas Co. v. FPC*, 324 U.S. 581, 598 (1945). The Oklahoma ratable-take scheme does not impose any improper regulatory obligation on interstate purchasers: it neither distorts price nor alters the volume of gas available to the interstate market. Rather, the Oklahoma scheme prudently regulates the physical means by which natural gas is produced, gathered and made available for distribution to the intrastate and interstate pipeline systems as authorized by section 1(b) of the NGA.

In *Champlin*, this Court sustained the implementation and use of state "allowable" orders which imposed ceilings on the volume of gas available for production from a particular well. These orders required interstate purchasers to allocate their "take demands" among many wells. The resultant effect was precisely the same as that which would have been caused by imposition of ratable-take orders inasmuch as both orders are designed to prevent detrimentally disproportionate taking of gas among wells. *Champlin*, 286 U.S. at 233. Indeed, this Court determined:

> [t]he terms "production and gathering" in §1(b) are sufficient in themselves to reserve to the States not merely "control over the drilling and spacing of wells and the like," *Colorado Interstate Gas Co. v. FPC*, 324 U.S. 581, 603 (1945), but also the power to regulate rates of production over time -- a

> key element, after all, in efforts to prevent waste and protect correlative rights.

Northwest Central Pipeline, 57 U.S.L.W. at 4307. Oklahoma's and the amici states' regulatory programs include comprehensive guidelines which direct the production and gathering of natural gas in a manner designed to prevent waste, protect valuable property rights, and ensure the existence of long-term natural gas supplies to fuel the nation's economy. This Court recently unanimously recognized the importance of the continued authority of the states to enact and enforce regulations for waste prevention and protection of correlative rights. *Id.* at 4308.

The statute and rule declared unconstitutional by the Tenth Circuit are vital parts of Oklahoma's "production and gathering" regulatory framework, and if these portions of its program are selectively amputated, that state's regulatory scheme would be effectively disabled. The result would be an impairment of Oklahoma's ability to prevent waste, protect property rights and ensure the availability of limited natural resources. This result is directly contrary to the goals and purposes of the NGA and NGPA, especially the express reservation of "production and gathering" regulation to the states. Congress did not intend this result when it enacted section l(b) of the NGA.

IV. Conclusion

In this case, the Court has an opportunity to address an issue never expressly ruled on by this Court, specifically, whether a priority of production schedule, designed to prevent waste, passes constitutional muster. In addition, this case gives the Court the opportunity to further delineate the roles of the federal and state agencies in regulating the natural

gas production and transportation industry in the vitally important areas of conservation and property rights. The Court should issue the requested writ of certiorari to settle these crucial issues. In the alternative, the Court should vacate the judgment of the lower court and remand for consideration in light of *Northwest Central Pipeline*.

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